APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

v.

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

No. 91 C 5525
Honorable
Charles R. Norgle

ORDER

Before the court are the objections of defendant The Society of Lloyd's ("Lloyd's") and defendants Harris Bank Glencoe-Northbrook, N.A. and Harris Trust and Savings Bank (together "Harris Bank") to Magistrate Judge Gottschall's September 26, 1991 report and recommendation (attached as Appendix A) that plaintiffs Kenneth F. Bonny and Francesca B. Bonny's (the "Bonnys") motion for a preliminary injunction be granted. For reasons that follow, the recommendation is rejected and the Bonnys' motion is denied.

FACTS

The Bonnys filed the instant lawsuit on August 30, 1991 alleging that they were fraudulently, and in violation of various federal and state securities laws, induced to become members of Lloyd's and to participate as underwriters in several insurance

syndicates marketed at Lloyd's.[1] The complaint sought damages, rescission of the Bonnys' membership agreements with Lloyd's, and an injunction barring the defendants, pending the outcome of this case, from drawing upon letters of credit issued by Harris Bank which the Bonnys were required to obtain as a condition of their Lloyd's membership.

The Bonnys filed the present motion for injunctive relief on September 3, 1991. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Bonnys' motion was referred to the Magistrate Judge. Lloyd's opposition to the Bonnys' motion was limited to one issue: whether forum selection and choice of law clauses in the Bonnys' membership and agency agreements, requiring that all disputes be litigated before English courts or arbitrators under English law, deprived the court of jurisdiction.[2] Lack of jurisdiction, Lloyd's contended, would preclude a finding that the Bonnys had a reasonable likelihood of succeeding on the merits, one of the requirements for injunctive relief.

The Magistrate Judge found that the forum selection clauses should not be enforced. In reaching that conclusion, she first found that freely negotiated forum selection and choice of law clauses must be enforced, unless there were strong countervailing public policy considerations. She found such public policy considerations, however, in a ban on prospective waivers of claims under the Securities Act of 1933, 15 U.S.C. § 77n.

Although the Bonnys could pursue some of their claims in the English courts — including their common law fraud claims and their claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 — the Magistrate Judge found that the Bonnys might be barred there from pursuing their claims under the 1933 Act, 15 U.S.C. § 771(1), (2). Several English statutes grant various forms of civil immunity to Lloyd's. The Magistrate Judge found that at least one of those statutes could be used to bar the Bonnys'

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[1] An amended complaint was filed on November 4, 1991 adding plaintiff Robert D. Flesvig and defendant Alan J. Hunken. By stipulation, Flesvig has joined in the Bonnys' motion.

[2] Lloyd's presses the same issue in its motion to dismiss the amended complaint, currently pending before Magistrate Judge Gottschall.

claims under the 1933 Act. Additionally, even though Lloyd's and its related defendants agreed not to seek immunity from the 1933 Act claims, the Magistrate Judge found that an English court could apply the immunity on its own initiative to further English public policy. The Magistrate Judge was not dissuaded from this view by the affidavit of an English barrister submitted on Lloyd's behalf expressing the opinion that an English court would not rule on a defense not raised by Lloyd's. The affidavit further opined that relief similar to that available under the 1933 Act was available under English common law.

Lloyd's raises three objections to the Magistrate Judge's report and recommendation: (1) United States public policy is not a sufficient basis to block enforcement of an international forum selection clause, (2) Lloyd's would not be immune in England from the 1933 Act claims, and (3) even if Lloyd's could utilize such immunity, the Bonnys would lose nothing because their federal securities law claims are time-barred.

Harris Bank also objects to the issuance of a preliminary injunction, arguing that there was no finding of fraud sufficient to void the Bonnys' entire agreement with Lloyd's and that without such a finding, "the integrity of the clean, irrevocable letter[s] of credit" should not be disturbed.

DISCUSSION

The Bonnys, in order to obtain a preliminary injunction, must show all of the following: (1) a reasonable likelihood of success on the merits, (2) lack of an adequate remedy at law, (3) that they would suffer injury without an injunction greater than any injury an injunction will cause defendants, and (4) that the injunction will not harm the public interest. *S.E.C. v. Cherif*, 933 F.2d 403, 408 (7th Cir. 1991) (citing *Roland Machinery Co. v. Dresser Industries Inc.*, 749 F.2d 380, 386-89 (7th Cir. 1984)), *cert. denied*, 60 U.S.L.W. 3520 (1992). Harris Bank contends that as to injunctions against payment on letters of credit, an additional element must be shown — fraud that vitiates the whole transaction *See Warner v. Central Trust Co., N.A.*, 715 F.2d 1121, 1123 (6th Cir. 1983); *Stringer Constr. Co. v. American Ins. Co.*, 102 Ill. App. 3d 919, 922-23, 430 N.E.2d 1,4 (1st Dist. 1981).

Lloyd's focused on the first element, as did the Magistrate Judge, and this court finds that element dispositive, making it unnecessary to address the other elements. Lloyd's correctly argues that the Bonnys have no likelihood of success on the merits if the forum selections clauses would prevent the case from being heard here.

Forum selection clauses in international agreements eliminate a host of uncertainties and potential inconveniences, and for that reason are "an indispensable element in international trade, commerce and contracting." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972). "[C]oncerns of international comity [and] respect for the capacities of foreign and transnational tribunals" further supports enforcement of international forum selection clauses, regardless of whether the results would differ in a foreign court. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). Accordingly, such clauses are given "special deference," *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 795 (7th Cir. 1981), and must be specifically enforced unless a challenging party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen*, 407 U.S. at 15.

The Bonnys must therefore show more than inconvenience or a diminished chance of success in England to overcome the forum selection clause. The Magistrate Judge, however, found only that the Bonnys might be unable to litigate some of their claims and might receive a lesser remedy if they win in England. The burden seems to have been put on Lloyd's rather than on the Bonnys, upon whom it belonged. The speculative nature of the harms the Bonnys might suffer cuts against them, not against Lloyd's. Moreover, it is hardly clear that such harms would be sufficient to overcome the forum selection clauses.

The Magistrate Judge found the forum selection clauses unenforceable based on dicta in a footnote in the *Mitsubishi* opinion, 473 U.S. at 637 n.19, which stated that forum selection and choice of law clauses that together constituted prospective waivers of statutory antitrust remedies would be void as against public policy. But even assuming that there is a prospective waiver of securities law remedies here, it is doubtful that such

a waiver can obviate the strong presumption of validity of the forum selection clauses. This presumption clearly applies when securities law claims are at issue, including claims under the Securities Act of 1933 and the Securites Exchange Act of 1934, both of which contain anti-waiver provision. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-17 (1974).

The anti-waiver provision in the 1933 Act, 15 U.S.C. § 77n, was cited by the Magistrate Judge in Support of her finding that the *Mitsubishi* footnote's public policy exception should apply. That finding, however, is contrary to *Scherk* and its guidance that the nature of the contract — i.e. whether the contract was formed entirely within the United States or whether it is a truly international agreement — is the key factor. The contracts containing the forum selection clauses involve the Bonnys' membership in Lloyd's, located in London, England, and their participation in insurance syndicates marketed at Lloyd's. Negotiations over the contracts apparently took place in both Illinois, where the Bonnys reside, and in England. Therefore, without the forum selections and choice of law clauses, there could have been substantial international choice of law questions. In these circumstances, United States securities laws and the public policies they represent do not stand in the way of international forum selection clauses. *See Scherk*, 417 U.S. at 516-20. Furthermore, there is nothing in the record suggesting that England is a fundamentally unfair forum in which to litigate the Bonnys' claims. *See Carnival Cruise Lines, Inc., v. Shute*, 111 S.Ct. 1522, 1528 (1991) (fundamental fairness scrutiny of chosen forum's relation to the dispute).

In sum, the Bonnys have failed to make a sufficient showing to overcome the presumed validity of the forum selection clauses at issue. They therefore cannot show a reasonable likelihood of success on the merits as they must to obtain a preliminary injunction.

CONCLUSION

The recommendation of the Magistrate Judge is rejected, and the Bonnys' motion for a preliminary injunction is denied.

IT IS SO ORDERED.

ENTER:

CHARLES R. NORGLE

CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 2/24/92